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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:

LEEWARD HOTELS, L.P., an Arizona
limited partnership,

Debtor.

Chapter 11 Proceedings

Case No. B-99-09162-ECF-GBN

**RESPONSE TO LENNAR'S MOTION FOR
TEMPORARY ALLOWANCE OF SECURED
LENDER'S CLAIMS AND REPLY TO
RESPONSE AND OBJECTION TO MOTION
FOR TEMPORARY ALLOWANCE OF
CLAIMS FOR VOTING PURPOSES**

Hearing Date: May 4, 2000
Time: 11:00 a.m.

Debtor responds to the Motion for Temporary Allowance of Secured Lender's Claims ("Motion") and replies to the Response and Objection to Motion for Temporary Allowance of Claims for Voting Purposes ("Objection") filed by Lennar.

The issue of voting allowance has become more problematic for Lennar than perhaps it originally anticipated. Its 8-page Objection focuses quite dramatically on the voting power of unsecured creditors many of which have claims of less than \$100. It was only in an afterthought pleading styled Supplemental Brief Regarding Temporary Allowance of Secured Lender's Claims ("Supplement") that Lennar recognized that because of its status as a preference recipient, it did not have an allowed claim entitling it to vote. This is a real problem for Lennar and its Plan of Reorganization. Now that the balloting results are complete, it is clear that the only accepting impaired class for the Lennar Plan is Lennar. All other classes are either unimpaired or have rejected the Plan. Thus, without a vote, Lennar's Plan is doomed to failure as a matter of law.

1 Debtor has filed an objection to the Lennar proofs of claim on the basis that many charges are
2 improper. Lennar has responded that the entire claims are not subject to objection and thus should be estimated
3 in some amount for voting purposes. The more poignant issue is whether the preference claim against Lennar
4 serves to disenfranchise it in total. In January Debtor filed a preference complaint against Lennar alleging Lennar,
5 which has admitted it is an undersecured creditor, received approximately \$500,000 within 90 days prior to the
6 filing of the bankruptcy. Although Lennar avows that it will defend the action vigorously, nothing else has
7 transpired in the case. While it has asserted a number of defenses, two things are clear: it received the funds
8 immediately prior to the bankruptcy and it is an undersecured creditor. Lennar will have an uphill battle.

9 Section 1126(a) of the Code provides that only a “holder of a claim or interest allowed under
10 section 502 of this title may accept or reject a plan.” As noted by the court in In re M. Long Arabians, 103 B.R.
11 211, 215 (9th Cir. BAP 1989), “until a party is deemed to have an ‘allowed’ claim, or actually has an allowed claim,
12 it has no right to accept or reject a plan.” Section 502(d) provides that

13 Notwithstanding subsections (a) and (b) of this section, the court shall disallow any
14 claim of any entity from which property is recoverable under section 542, 543, 550
15 or 553 of this title or that is a transferee of a transfer avoidable under section 522(f),
522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or
transferee has paid the amount, or turned over any such property, . . .

16 This section is absolute. The Court must disallow the claim of a preference recipient unless the property is
17 returned. If the creditor does not have an allowed claim, it cannot vote. Accordingly, Lennar cannot vote.

18 Lennar complains that it is unfair to disenfranchise the largest creditor in the case because it
19 intends to defend the preference action. That may seem appealing. But, by the same token, it is unfair to have
20 the largest creditor put forth a plan of reorganization which pays nothing to other creditors when it is the recipient
21 of pre-petition monies which should be returned to the estate to pay those same creditors. It is unfair to have
22 the largest creditor voting against a plan which pays 100 percent to other creditors when it is has already received
23 a priority payment to the detriment of those same creditors.

24 The two cases cited by Lennar do not stand for the proposition that the preference case must be
25 proven before a vote is disallowed. Although each case discusses the allowance or disallowance of claims, neither
26 involved the issue of voting. In this case, the correct thing to do is to disallow Lennar’s vote. A compelling
27 reason for disallowing a creditor’s vote in the M. Long Arabians case was the fact that the creditor had filed an
28 objection and still would be heard. Here, Lennar has filed a 39-page objection to Debtor’s Plan. It is certain it

1 will be heard whether or not its vote counts.

2 With respect to Lennar's attempted disenfranchisement of other creditors, Debtor would reply
3 as follows:

4 1. Mavco Construction – secured claim for \$59,375

5 Lennar has apparently admitted this is a secured claim and there is no basis for its objection.
6 Interestingly, Lennar states this claim was mis-classified on Debtor's schedules yet the page from Schedule E,
7 an exhibit provided by Lennar shows the claim as secured.

8 2. Bernalillo – secured claim for \$21,173

9 This is also a secured claim for real estate taxes and Lennar admits begrudgingly that it has no
10 basis for an objection. This creditor did not vote and so the issue is irrelevant for purposes of the Motion.

11 3. AMRESKO – secured claim for approximately \$2,700,000

12 This claim has been purchased by ACP Mortgage, Inc. A secured proof of claim
13 was filed in the approximate amount of \$2,725,000. ACP is fully secured. The amount of \$83,921 to which
14 Lennar has objected was simply a monthly payment which appeared on an accounts payable listing and was
15 mistakenly listed as an unsecured debt. The Debtor's schedules have been amended accordingly. More
16 importantly, Lennar has not objected to ACP's secured claim. ACP is entitled to vote in its secured class. It voted
17 in favor of the Debtor's Plan and against the Lennar Plan and its ballot should be counted.

18 4. Taxes – City of Albuquerque \$21,216.81, Albuquerque Tax & Rev. Dept. \$30,477.91;
19 Las Cruces Tax & Rev. Dept. \$5,149.57

20 These are priority claimants and are unimpaired under both Plans. None of these creditors voted.
21 The issue is irrelevant for purposes of the Motion.

22 5. Franchisors – Holiday Inn, Ramada, Best Western

23 Best Western and Holiday Inns have filed sizeable proofs of claim. Ramada has asserted a huge
24 damages claim through its adversary proceeding. Irrespective of any position they might claim about the transfer
25 of the hotels, they are all three asserting claims against the estate. Lennar has objected to only portions of their
26 claims. Under the same theory Lennar has espoused in its Motion, these creditors should be entitled to vote at
27 least the amount of claims to which there is no objection.
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